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Attorneys for Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

In re:
 USA COMMERCIAL MORTGAGE COMPANY,
 Debtor.

In re:
 USA CAPITAL REALTY ADVISORS, LLC,
 Debtor.

In re:
 USA CAPITAL DIVERSIFIED TRUST DEED
 FUND, LLC,
 Debtor.

In re:
 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 Debtor.

In re:
 USA SECURITIES, LLC,
 Debtor.

Affects:

- ☐ All Debtors
- ☐ USA Commercial Mortgage Company
- ☐ USA Securities, LLC
- ☐ USA Capital Realty Advisors, LLC
- ☒ USA Capital Diversified Trust Deed Fund, LLC
- ☐ USA First Trust Deed Fund, LLC

Case No. BK-S-06-10725 LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

Chapter 11

Jointly Administered Under
 Case No. BK-S-06-10725-LBR

OMNIBUS OBJECTION OF POST-EFFECTIVE DATE USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC, TO PROOFS OF INTEREST

Hearing Date: July 27, 2007
 Hearing Time: 9:30 a.m.
 Hearing Place: Courtroom 1

Post-Effective Date USA Capital Diversified Trust Deed Fund, LLC ("Diversified"), a
 revested debtor in the above-captioned cases, by and through its counsel noted above, hereby
 submits this Omnibus Objection of Post-Effective Date USA Capital Diversified Trust Deed
 Fund, LLC To Proofs of Interest (the "Objection"),¹ pursuant to which Diversified objects to the

¹ Due to the number of proofs of interest involved, this Objection is one of three objections to proofs of interest all filed substantially contemporaneously which, when taken together, will assert objections to an aggregate total of fifty-five (55) proofs of interest filed in the Diversified chapter 11 case.

1 proofs of interest referenced herein (the “Subject Interests”) and as listed on **Exhibit 1**, attached
2 hereto and made a part hereof, on the grounds that they (i) do not assert the correct amount of
3 the equity interests held in Diversified as of the Petition Date (defined below) by the parties who
4 filed the Subject Interests (the “Parties”), or (ii) are duplicates of proofs of interest already filed
5 in the Diversified case. By this Objection, Diversified requests that the Subject Interests be
6 disallowed (i) to the extent they assert amounts that are different from each respective Party’s
7 equity interest in Diversified as of the Petition Date as reflected in Diversified’s books and
8 records and allowed in the amount of each Party’s equity interest in Diversified as of the Petition
9 Date per Diversified’s books and records, or (ii) in their entirety to the extent they are
10 duplicative of proofs of interest already on file in the Diversified case. By this Objection,
11 Diversified does not seek to prejudice the rights of any Diversified Member (as defined herein)
12 who filed a Subject Interest to recover from Diversified on account of his or her membership
13 interest in Diversified. A detailed list of the Subject Interests and the relief sought with respect
14 to each Subject Interest is set forth on Exhibit 1 attached hereto.

15 The Objection is made pursuant to Section 502 of chapter 11 of Title 11 of the United
16 States Code (the “Bankruptcy Code”), Rule 3007 of the Federal Rules of Bankruptcy Procedure
17 (the “Bankruptcy Rules”), Rule 3007 of the Local Rules of Bankruptcy Practice (the “Local
18 Rules”), the points and authorities contained herein, the pleadings and papers on file with the
19 Court in the above-captioned cases, as referenced by docket number, judicial notice of which is
20 respectfully requested, and any oral argument of counsel the Court may wish to entertain at the
21 hearing on this matter.

22 WHEREFORE, for all of the reasons set forth herein, Diversified respectfully requests
23 that the Court enter an order (i) sustaining the Objection; (ii) disallowing the Subject Interests to
24 the extent they assert amounts that are different from each respective Party’s equity interest in
25 Diversified as of the Petition Date as reflected in Diversified’s books and records and allowed in
26 the amount of each Party’s equity interest in Diversified as of the Petition Date per Diversified’s
27 books and records, (iii) disallowing the Subject Interests in their entirety to the extent they are
28

1 duplicative of proofs of interest already on file, and (iv) granting such other and further relief as
2 the Court may deem just and proper.

3 DATED this 8th day of June 2007.

4 **BECKLEY SINGLETON, CHTD.**

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19 **POINTS AND AUTHORITIES**

20 **I.**

21 **JURISDICTION**

22 1. The Court has jurisdiction over this Objection pursuant to 28 U.S.C. §§ 1334 and
23 157. Venue is appropriate under 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding
24 under 28 U.S.C. § 157(b)(2)(B).

25 2. The statutory predicate for the relief requested herein are 11 U.S.C. § 502 and
26 Bankruptcy Rule 3007.

27 **II.**

28 **STATEMENT OF FACTS**

A. Procedural Background Information.

3. On April 13, 2006 (the "Petition Date"), USA Commercial Mortgage Company
("USACM"), USA Securities, LLC ("USA Securities"), USA Capital Realty Advisors, LLC

1 (“USA Realty”), USA First Trust Deed Fund, LLC (“FTDF”), and the Diversified Fund
2 (collectively with USACM, USA Securities, USA Realty, and the FTDF, the “Debtors”) filed
3 voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continued
4 to operate their businesses, if any, as debtors-in-possession pursuant to sections 1107(a) and
5 1108 of the Bankruptcy Code. Post-petition management of the Debtors was under the direction
6 of Thomas J. Allison of Mesirow Financial Interim Management, LLC (“Mesirow”), who served
7 as the Chief Restructuring Officer.

8 4. On May 4, 2006, the Court entered its Amended Order Approving Debtor’s Ex
9 Parte Application for Order Approving Employment of BMC Group, Inc. as the Claims Agent
10 for Debtor’s Estate [Docket No. 149] authorizing BMC Group, Inc. (“BMC”) to serve as the
11 Court’s notice agent and to act as the claims agent for the Debtors.

12 5. On May 9, 2006, the Court entered its Order Regarding Joint Administration
13 Without Substantive Consolidation [Docket No. 184] linking the Chapter 11 Cases for joint
14 administration under the USACM case name and number, BK-S-06-10725-LBR.

15 6. On June 15, 2006, pursuant to Bankruptcy Code Section 521(a)(1)(B), each of the
16 Debtors filed their “Summary of Schedules and Statement of Financial Affairs” (collectively, the
17 “Schedules”) based upon their books and records as of the Petition Date.

18 7. On September 14, 2006, the Court entered its Order Setting Deadline to File
19 Proofs of Claim and Proofs of Interest [Docket No. 1280] setting the deadline of November 13,
20 2006 (“Bar Date”), to file proofs of claim in the Chapter 11 Cases.

21 8. On September 15, 2006, the Court approved the Stipulated Order re Proofs of
22 Interest [Docket No. 1293], in which the Debtors, the duly appointed Official Committee of
23 Equity Security Holders of USA Capital Diversified Trust Deed Fund, LLC (the “Diversified
24 Committee”), and the duly appointed Official Committee of Equity Security Holders of USA
25 Capital First Trust Deed Fund, LLC (the “FTDF Committee”) stipulated that (1) the list of
26 members with interests in Diversified and USA Capital First Trust Deed Fund, LLC (“FTDF”) provided by the Debtors to BMC shall be deemed the list of equity security holders filed
27 pursuant to Bankruptcy Rule 1007(a)(3) and shall constitute *prima facie* evidence of the validity
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1 and amount of equity security interests in Diversified and FTDF; (2) each holder of such
2 interests shall be given notice of the Debtor in which it has an interest, and, if applicable,
3 whether that interest is alleged to be contingent or disputed; (3) it shall not be necessary for the
4 holders of such interests to file a proof of interest; and (4) the holders of such interests shall be
5 deemed to have filed a proof of interest in the amount shown on the lists provided by the
6 Debtors.

7 9. On or around September 18, 2006, BMC mailed proof of claim and proof of
8 interest forms, together with instructions explaining that (i) if any equity interest holder (such as
9 a Diversified Member) wished to assert a claim (as opposed to an equity interest) against any of
10 the Debtors, then that equity holder must file a proof of claim but that proofs of claim should
11 only be filed in those instances where the claimant believed one of the Debtors owed the
12 claimant monies for such things as damages, rescission, reimbursement or contribution; and (ii)
13 if the equity interest holder had no disagreement with the amount indicated on the proof of
14 interest form included in the mailing, then that equity interest holder need take no action and his
15 proof of interest in the Diversified Fund would be deemed allowed in the amount shown on the
16 proof of interest form.

17 10. On November 16, 2006, Debtors filed the Debtors Third Amended Joint Chapter
18 11 Plan of Reorganization (the "Plan").

19 11. On December 20, 2006, the Court orally confirmed the Plan and on January 8,
20 2007, the Court entered an order confirming the Plan [Docket No. 2376].

21 **B. The Debtors' Businesses.**

22 12. As of the Petition Date, USACM acted as the servicer for 115 separate loans (the
23 "Loans") having a combined outstanding loan balance of approximately \$962 million. *See*
24 Supplemental Declaration of Thomas J. Allison in support of Debtors' Motions [Docket No.
25 130], ¶ 2. All but three of the Loans were to have been secured by a deed of trust recorded
26 against commercial real property. *Id.*, at ¶ 3.

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1 13. According to the Debtors, there are an estimated 3,600 investors (the “Direct
2 Lenders”) whose names appear as lenders in the documents for one or more of the Loans. *Id.*,
3 at ¶ 5. Diversified (together with FTDF, the “Fund Lenders”) is one such Direct Lender.

4 **C. Diversified and Its Holdings.**

5 14. Diversified was formed in 2000 for the sole purpose of investing in non-insider
6 loans secured by first position deeds of trust on real property.

7 15. As of the Petition Date, Diversified had an interest as a Direct Lender in 23 of
8 the Loans (the “Diversified Fund Loans”). In the Diversified Fund Loans, Diversified was the
9 sole Direct Lender in 7 and held only a fractional interest in the remaining 16 Loans.

10 16. Diversified is owned by approximately 1,344 Diversified Members who
11 purchased membership interests in the Diversified corporate entity. It bears emphasizing that it
12 is Diversified as a corporate entity, and not the Diversified Members, that is a Direct Lender on
13 the Diversified Fund Loans. Likewise, it is Diversified’s investments, and not those of the
14 Diversified Members, that are secured – or should have been secured – by deeds of trust. The
15 Diversified Members are only entitled to receive distributions from Diversified to the extent
16 Diversified has profits remaining after all of its expenses and valid claims have been paid.
17 Thus, the Diversified Members own Diversified, not Diversified’s investments, by virtue of
18 their equity security interests.

19 **D. Analysis of Proofs of Interest Filed in the Diversified Case.**

20 17. As of the filing of this Objection, 195 proofs of interest had been filed in the
21 Diversified case.

22 18. Diversified has analyzed all of the proofs of interest filed in the Diversified case
23 and has determined that most assert an amount that corresponds with the amount of the equity
24 interest held in Diversified by the respective Party as of the Petition Date, as reflected in the
25 Debtor’s books and records. However, 35 of the proofs of interest filed in the Diversified case
26 assert equity interests in Diversified that do not correspond to the amount of the equity interest
27 held in Diversified by the respective Party as of the Petition Date, as reflected in the Debtors’
28 books and records. Six of the Subject Interests are interests with such differing amounts (the

“Differing Interests”). A detailed listing of the Differing Interests is included in Exhibit 1 attached hereto and incorporated for all purposes herein by this reference. In summary, Diversified has no liability for any of the Differing Interests to the extent the amounts asserted by each Differing Interest exceed the amount of the filing Party’s equity interest in Diversified as of the Petition Date as reflected in Diversified’s books and records. Accordingly, the Differing Interests should be disallowed in whole or in part as set forth in Exhibit 1.

19. Nineteen of the proofs of interest filed in the Diversified case are duplicative of proofs of interest already on file in the Diversified case that correspond to the amount of the equity interest held in Diversified by the respective Party as of the Petition Date, as reflected in the Debtor’s books and records, and are deemed allowed. Fourteen of the Subject Interests are such duplicative interests (the “Duplicative Interests”). A detailed listing of the Duplicative Interests is included in Exhibit 1 attached hereto and incorporated for all purposes herein by this reference. In summary, Diversified has no liability for any of the Duplicative Interests, and all such interests should be disallowed in their entirety.

II.

ARGUMENT

A. Interests Should Be Allowed Only in the Amounts Set Forth in the Debtors’ Books and Records.

Bankruptcy Code Section 502 authorizes a party in interest to object to claims or interests. *See* 11 U.S.C. §502(a). Upon such objection, this Court, “after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition” 11 U.S.C. § 502(b). Although a proper proof of claim or interest is presumed valid under Bankruptcy Rule 3001(f), once an objection controverts the presumption, the holder of the claim or interest has the ultimate burden of persuasion as to the validity and amount of the claim. *Ashford v. Consolidated Pioneer Mortg. (In re Consolidated Pioneer Mortg.)*, 178 B.R. 222, 226 (B.A.P. 9th Cir. 1995), *aff’d*, 91 F.3d 151 (9th Cir. 1996) (quoting *In re Allegheny International, Inc.*, 954 F.2d 167, 173-74 (3d Cir. 1992)).

1 The Bankruptcy Appellate Panel for the Ninth Circuit explained the shifting burdens of
2 proof with respect to objection to proofs of claim as follows:

3 The burden of proof for claims brought in the bankruptcy court under 11
4 U.S.C.A. § 502(a) rests on different parties at different times. *Initially, the*
5 *claimant must allege facts sufficient to support the claim. If the averments*
6 *in his filed claim meet this standard of sufficiency, it is “prima facie”*
7 *valid. In other words, a claim that alleges facts sufficient to support a*
legal liability to the claimant satisfies the claimant’s initial obligation to
go forward. . . . The burden of persuasion is always on the claimant.

8 *Id.* (emphasis added). Following this decision, the District Court for the Northern District of
9 California emphasized, “unless the claimant has alleged ‘facts sufficient to support a legal
10 liability, ‘the claim is not prima facie valid.’ *In re Hongnisto*, 293 B.R. 45, 50 (N.D. Cal. 2003)
11 (quoting *Consolidated Pioneer Mortg.*, 178 B.R. at 266) (holding that the claimant’s proof of
12 claim failed to allege sufficient facts to support a legal liability and consequently disallowed the
13 proof of claim); *see Consolidated Pioneer Mortg.*, 178 B.R. at 227 (holding that because the
14 proof of claim did not allege sufficient facts to support the claim, the proof of claim was
15 disallowed). As Bankruptcy Code Section 502(a) refers to both claims and interests, the burden
16 shifting analysis described above applies to proofs of interest as well as to proofs of claim. *See*
17 11 U.S.C. § 502(a) (“A claim or interest, proof of which is filed under section 501 of this title,
18 is deemed allowed, unless a party in interest . . . objects.”).

19 **B. Duplicative Interests Should Be Disallowed.**

20 Holders of claims or interests should not be allowed multiple recoveries for the
21 identical claim or interest. As set forth in paragraph 19 above, several of the Subject
22 Interests are duplicative of other proofs of interest filed in the Diversified case and,
23 accordingly, should be disallowed. Bankruptcy Code Section 502(b)(1) provides that a
24 bankruptcy court shall not allow a claim that “is unenforceable against the debtor and property
25 of the debtor, under any agreement or applicable law for a reason other than because such claim
26 is contingent or unmatured.” 11 U.S.C. § 502(b)(1). Section 502 therefore precludes the
27 allowance of duplicative proofs of interest because applicable law plainly prevents a claimant
28 from recovering twice on a single interest. *See Fine Organics Corp. v. Hexcel Corp. (In re*

1 *Hexcel Corp.*), 174 B.R. 807, 811 (Bankr. N.D. Cal. 1994) (noting the bankruptcy policy
 2 “intended to protect the limited assets of the estate from duplicative claims”); *In re Finley*,
 3 *Kumble, Wagner, Heine, Underberg, Manley, Myerson & Casey*, 160 B.R. 882, 894 (Bankr.
 4 S.D.N.Y. 1993) (“to allow one creditor to assert two dollars in claims for every one dollar of
 5 loss from the same debtor violates principles of ratable distribution and offends notions of
 6 uniform treatment for creditors”) (quotations omitted). Therefore, all of the Duplicative
 7 Interests should be disallowed in their entirety.

8 III.

9 NOTICE

10 This Objection will be served on (i) all of the parties who filed the Subject Interests at
 11 the addresses set forth on the parties’ respective proofs of interest, (ii) all parties on the Post
 12 Effective [Date] [sic] Official Service List for Limited Notice No. 2 dated June 1, 2007 [Docket
 13 No. 3874] and (iii) all parties who have filed requests for special notice since the filing of such
 14 master service list. In light of the nature of the relief requested, Diversified submits that no
 15 further notice need be given.

16 IV.

17 CONCLUSION

18 WHEREFORE, for all of the reasons set forth herein, Diversified respectfully requests
 19 that the Court enter an order (i) sustaining the Objection; (ii) disallowing the Differing Interests
 20 to the extent they assert amounts that are different from each respective Party’s equity interest in
 21 Diversified as of the Petition Date as reflected in Diversified’s books and records and allowed in
 22 the amount of each Party’s equity interest in Diversified as of the Petition Date per Diversified’s
 23 books and records, (iii) disallowing the Duplicative Interests in their entirety to the extent they

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1 are duplicative of proofs of interest already on file, and (iv) granting such other and further relief
2 as the Court may deem just and proper.

3 DATED this 8th day of June 2007.

4 **BECKLEY SINGLETON, CHTD.**

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18 *Diversified Trust Deed Fund, LLC*
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EXHIBIT 1

Proofs of Interest Subject to Objection

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
128	Brian M. Adams	13571	11/10/06	\$325,000	\$312,307.60	Disallow interest to the extent it exceeds \$312,307.60, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.
194	Philip Benjamin	10038	01/13/07	\$29,632.19	\$29,632.19	Disallow interest in its entirety as duplicative of interest no. 193 already filed in the Diversified case.
035	Ramona Bigelow	16949	09/28/06	\$26,240.83	\$26,240.83	Disallow interest in its entirety as duplicative of interest no. 16 already filed in the Diversified case.
149	Johnny Clark	3190	11/13/06	\$99,467.90	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
166	Johnny Clark	9590	11/13/06	\$99,467.90	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records
067	Joseph Deuerling	6953	10/20/06	\$240,236.61	\$240,236.61	Disallow interest in its entirety as duplicative of interest no. 47 already filed in the Diversified case.
185	Allan Ebbin	14505	11/10/06	\$159,582.17	\$159,582.17	Disallow interest in its entirety as duplicative of interest no. 182 already filed in the Diversified case.
181	George D. Frame	16149	11/09/06	\$51,920.28	\$51,920.28	Disallow interest in its entirety as duplicative of interest no. 82 already filed in the Diversified case.
081	Courtney Fuhrman	3990	11/09/06	\$48,047.32	\$48,047.32	Disallow interest in its entirety as duplicative of interest no. 61 already filed in the Diversified case.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
129	Gary Michelsen	11005	11/10/06	\$58,667.14	\$58,667.14	Disallow interest in its entirety as duplicative of interest no. 113 already filed in the Diversified case.
161	Gary Michelsen	11005	11/10/06	\$58,667.14	\$58,667.14	Disallow interest in its entirety as duplicative of interest no. 113 already filed in the Diversified case.
121	Brian Herman & Anthony G. Adams	4349	11/08/06	\$3,625,000	\$3,483,430.96	Disallow interest to the extent it exceeds \$141,569.04, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records
195	Prescia Investments	18705	01/16/07	\$379,924.09	\$379,924.09	Disallow interest in its entirety as duplicative of interest no. 13 already filed in the Diversified case.
151	John E. Michelsen	12005	11/13/06	\$444,137.48	\$444,137.48	Disallow interest in its entirety as duplicative of interest no. 131 already filed in the Diversified case.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
077	Rex McBride	3616	10/12/06	\$50,000.00	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records
165	Bruce McGimsey	9316	11/13/06	\$86,171.22	\$86,171.22	Disallow interest in its entirety as duplicative of interest no. 144 already filed in the Diversified case.
145	Margaret McGimsey	5584	11/13/06	\$96,094.75	\$96,094.75	Disallow interest in its entirety as duplicative of interest no. 117 already filed in the Diversified case.
168	Margaret McGimsey	5584	11/13/06	\$96,094.75	\$96,094.75	Disallow interest in its entirety as duplicative of interest no. 117 already filed in the Diversified case.
148	Sharon McGimsey	8362	11/13/06	\$311,091.58	\$48,047.32	Disallow interest to the extent it exceeds \$48,047.32, which is the amount of the filing Party's equity interest in Diversified as of the Petition Date, as reflected in Diversified's books and records.

Proof of Interest No.	Equity Interest Holder	Acct ID #	Date of Proof of Interest	Asserted Equity Interest Amount	Amount of Equity Interest Per Debtors' Records	Proposed Disposition
167	Sharon McGimsey	8362	11/13/06	\$311,091.58	\$48,047.32	Disallow interest in its entirety as duplicative of interest no. 148 already filed in the Diversified case.